

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Steve Drazkowski,

Complainant,

vs.

**FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER**

Daniel Richard Nelson and Daniel Miller,

Respondents.

The above-entitled matter came on for an evidentiary hearing on August 28, 2006, before a panel of three Administrative Law Judges: Kathleen D. Sheehy (Presiding Judge), Richard C. Luis and Steve M. Mihalchick. The hearing record closed at the conclusion of the hearing that day.

Steve Drazkowski (Complainant), 14369 654th Street, Wabasha, MN 55981, participated on his own behalf with assistance from his campaign manager, Deb Roschen, and his campaign treasurer, John Adams.

Matthew W. Haapoja, Attorney at Law, Trimble & Associates, Ltd., 10201 Wayzata Boulevard, Suite 130, Minneapolis, MN 55305, appeared on behalf of Daniel Richard Nelson and Daniel Miller (Respondents).

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUES

Did Respondents violate Minn. Stat. § 211B.06 by intentionally participating in the preparation or dissemination of false campaign material that Respondents knew was false or communicated to others with reckless disregard as to whether it was false?

The panel concludes that the Complainant failed to establish that Respondents violated Minn. Stat. § 211B.06, and therefore the Complaint against them is dismissed.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. The Complainant is a candidate for Minnesota Senate District 28.
2. Minnesota Senate District 28 covers most of Goodhue, Wabasha and northeast Winona Counties. The district is largely rural and includes the cities of Red Wing, Goodview, Rollingstone, Lewiston, St. Charles, Wabasha, Kellogg and Lake City.
3. Steve Murphy, a Democrat, has held the Senate seat since 1992 and is running for re-election this year.
4. In October of 2005, the Complainant was arrested and charged with fifth degree domestic assault for allegedly physically assaulting his 14-year-old daughter. The criminal complaint alleged that the Complainant grabbed his daughter by the shirt below the neck and lifted her off the ground during an argument about housework, leaving two red marks on her upper chest.¹
5. On January 13, 2006, a jury acquitted the Complainant of the assault charges after a three-day trial.²
6. At all relevant times, Respondent Dan Miller has been employed as an Assistant Research Director for the Minnesota Senate Republican Caucus. Senator Day is the Minority Leader of the Minnesota Senate. Respondent Miller is part of the Senate Republican Caucus's "leadership team" and he provides direction to the Caucus's researchers and other employees.³
7. Respondent Dan Nelson is employed as a researcher with the Senate Republican Caucus. Prior to this position, he worked for the House Republican Campaign Committee as a field staff member in the St. Cloud area, and later worked as a page in the Minnesota House. He started working as a researcher for the Senate Republican Caucus in August of 2005. In April of 2006, his direct supervisor was Dan Miller.
8. Employees of the Senate Republican Caucus routinely work on candidates' campaigns on their personal time. Many take leaves of absence from their Senate Caucus positions when the legislature is no longer in session, and work for the Senate Republican Campaign Committee, doing literature drops and other campaign activities on behalf of Republican candidates.⁴
9. Both Respondents Nelson and Miller are interested in politics and follow campaigns and elections. Both have volunteered on behalf of Republican candidates and both were interested in the Senate District 28 race. Respondent

¹ Ex. 2.

² Complaint Ex. G.

³ Testimony of Miller and Nelson.

⁴ Testimony of Nelson and Miller.

Miller has also written many campaign pieces for Republican candidates and he attended about six endorsing conventions in 2006.⁵

10. In the fall of 2005, Respondent Miller was aware of and concerned about the criminal charges against the Complainant. He had read and heard media reports concerning the charges against the Complainant.

11. Sometime in late January of 2006, the Complainant called Respondent Dan Miller and discussed his campaign and recent acquittal with him.⁶

12. Respondent Miller remained concerned that the publicity surrounding the Complainant's legal issues would adversely affect his ability to be elected. Miller viewed Senate District 28 to be an important seat, and it was a great concern to Miller that Democrats could use the negative information about the Complainant against him were the Complainant to be the Republican candidate on the ticket in November.⁷

13. Meg Walch and Steve Wilson were also candidates for Senate District 28. Senator Dick Day had encouraged Ms. Walch to run for the seat. All three candidates sought the Republican Party endorsement.⁸

14. In February of 2006, Respondent Dan Miller began volunteering as an advisor to Ms. Walch's campaign.

15. In the end of March or early April 2006, Respondent Miller wrote (but did not design) a campaign flyer on behalf of Meg Walch. One side of the flyer showed a picture of Ms. Walch under the statement: "A Strong Candidate Who Can Win in November."⁹ The other side of the flyer listed Ms. Walch's credentials as a "proven conservative leader" and included the statement: "Meg Walch is the Republican candidate who can win in November." In preparation for mailing the piece, Respondent Miller obtained a mailing list of the endorsing convention delegates and alternates from the State Republican Party.¹⁰ The Walch campaign planned to mail this piece to Republican delegates and alternates shortly before the endorsing convention.

16. In the same general time frame, Respondents Nelson and Miller discussed the Complainant's candidacy. Respondents were interested in discovering what potentially damaging public information was available that could be used by Democrats or other challengers against the Complainant.¹¹

⁵ Testimony of Miller.

⁶ Testimony of Miller.

⁷ Testimony of Miller.

⁸ Testimony of Walch.

⁹ Ex. 7.

¹⁰ Testimony of Miller.

¹¹ Testimony of Miller and Nelson.

Respondents believed the best candidate for Senate District 28 was Meg Walch.¹²

17. Respondent Nelson suggested to Respondent Miller that he could conduct some “opposition research” on the Complainant by going to Wabasha and seeing what information he could obtain about the Complainant from court records and the County Sheriff’s office.¹³

18. On April 18, 2006, Respondent Nelson took the day off work and, along with co-workers Amanda Hutchings and Tim Eng, went to Wabasha to obtain a copy of the Complainant’s booking photo (mug shot) and court records concerning the assault charges. Respondent Nelson obtained a copy of Complainant’s booking photo from the Wabasha County Sheriff’s Office for a \$10 copying fee.¹⁴ He then went to the Wabasha County courthouse and obtained copies of documents from the criminal file concerning the Complainant.¹⁵

19. Amanda Hutchings worked as a media writer for the Senate Republican Caucus in April of 2006.¹⁶

20. Tim Eng worked as a researcher for the Senate Republican Caucus in April of 2006. His direct supervisor was Dan Miller.¹⁷

21. On or about April 19, 2006, Respondent Nelson gave Respondent Miller the information he had obtained on the Complainant, including the copy of Complainant’s booking photo and copies of documents from the criminal file.¹⁸

22. Once Respondent Miller had obtained the information about the Complainant from Respondent Nelson, he decided to create a flyer critical of the Complainant that would be mailed out to Republican delegates and alternates shortly before the endorsing convention.¹⁹

23. Respondent Miller created the flyer with the dual intent of injuring or defeating the Complainant’s candidacy and promoting Meg Walch’s candidacy. Miller believed that the race for the Republican Party’s endorsement for the Senate District 28 seat was between the Complainant and Meg Walch, and he felt that the flyer would help Ms. Walch’s candidacy by hurting the Complainant’s candidacy.²⁰

¹² Testimony of Nelson and Miller.

¹³ Testimony of Nelson and Miller.

¹⁴ Complaint Ex. B.

¹⁵ Testimony of Nelson; Complaint Ex. D.

¹⁶ Testimony of Nelson.

¹⁷ Testimony of Nelson.

¹⁸ Testimony of Nelson.

¹⁹ Testimony of Miller.

²⁰ Testimony of Miller.

24. A scanned copy of one side of the campaign flyer created by Respondent Miller appears below:

651 345 4946

Horizon Milling

11:18:36 a.m. 08-21-2006

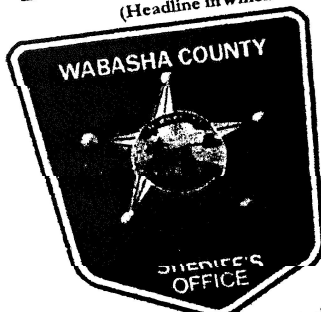
3 / 10

Exhibit #1

**With Steve Drazkowski on the ticket,
the DFL attack pieces write themselves.**

Senate Candidate Abuses Daughter, Still Running

(Headline in *Winona Daily News*, Saturday, October 22, 2005)



"I've heard of legislators doing some horrible things, but this honestly takes the cake...this man needs to step down from running, apologize publicly to his daughter, and to the public for wasting their time, and get the hell out of politics..."

(Political Commentary Posted on a Weblog at <http://northerndebater.blogspot.com>)

"Drazkowski is under a temporary restraining order not to have contact with his daughter. It was filed by his ex-wife on behalf of their daughter."

(News story posted online at http://wcco.com/crime/local_story_013200954.html)

"When she is living with her father, she is subjected to very strict rules ... All her clothing was strictly controlled ... because he thought it indicated she was promiscuous, or that it would make her promiscuous. Once, he burned several pairs of her underwear, because he thought they were provocative."

(Order of Proof, Court File No: CR-05-372, Wabasha County Attorney James C. Nordstrom, January 11, 2006)

"On one occasion, prior to October 13, 2005, Steven Drazkowski slapped Kinsey Drazkowski across the face when she was unable to hold a dog dish properly."

(Order of Proof, Court File No: CR-05-372, Wabasha County Attorney James C. Nordstrom, January 11, 2006)

MAILED IN COMPLIANCE WITH RULE 211B.04

25. Respondent Miller created the flyer using his home computer. The flyer features graphics of the Wabasha County Sheriff's Office badge and handcuffs along with quotes attributed to court documents, wcco.com, and a liberal political blog called the "northerndebater.blogspot.com." The flyer also features a headline that Respondent Miller attributed to the *Winona Daily News*.

26. The flyer was folded in half and sealed with tape for mailing. One half of the other side of the flyer was used for the recipient's mailing address. The remaining half of the other side of the flyer featured the booking photo of the

Complainant under the sentence: "We need a strong candidate who can win in November."²¹

27. Respondent Miller attributed the headline, "Senate Candidate Abuses Daughter, Still Running," to the "*Winon[a] Daily News*, Saturday, October 22, 2005."²²

28. No such headline ever ran in the *Winona Daily News*. Instead, the quoted headline is from a posting on the northerndebater.blogspot site. The blog ran this headline above a portion of an article that did appear in the *Winona Daily News* on October 22, 2005. The blog posting appeared as follows:

Rambling from the North: October 2005

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States

Saturday, October 22, 2005

SENATE CANDIDATE ABUSES Daughter, Still Running

WABASHA, Minn. — A state Senate candidate intends to continue his campaign physically assaulting his daughter.

SEN. STEVE MURPHY, said the charges against him are false. The alleged assault was reported to police Oct.

The 14-year-old girl, who had two red marks on her upper chest, told an author. She told authorities that her father had grabbed her by the shirt below the neck and lifted her off the ground.

Drazkowski spent a night in jail after his arrest. He told the author he wouldn't affect his decision to run for office.

<http://northerndebater.blog>

29. The blog posting contained a hyperlink that connected readers to the actual *Winona Daily News* article.

30. The actual headline that ran above the October 22, 2005, article about the Complainant in the *Winona Daily News* was: "State Senate candidate charged with assault."²³

²¹ Ex. 1 (underlining in original).

²² Ex. 1.

²³ Ex. 2.

31. The northerndebater.blogspot is a political blog that tends to oppose Republicans. Respondent Miller assumed postings on this blog concerning Republican candidates would be “spun.”²⁴

32. After creating the flyer on his home computer, Respondent Miller made copies and mailed them to the approximately 250 addresses of delegates and alternates in Senate District 28, using the same mailing list he had obtained from the State Republican Party for Ms. Walch’s campaign. Miller personally paid the costs of copying the flyer because he wanted the “right candidate” on the ticket in November and he wanted the Republicans to win the Senate District 28 seat in November.²⁵

33. Respondent Miller did not indicate on the flyer who had created or paid for the flyer. Instead, he disseminated the flyer anonymously, because he believed that if the delegates knew that he was behind the flyer it might make people think the Senate Republican Caucus was involved and he did not want “the message to be confused with the messenger.”²⁶

34. The piece that Respondent Miller wrote for Meg Walch was mailed by Ms. Walch’s campaign on April 25, 2006.²⁷

35. Respondent Miller mailed the campaign flyer about the Complainant on April 26, 2006, three days before the endorsing convention.²⁸

36. It was Respondent Miller’s hope that the Complainant would drop out of the race as a result of the campaign flyer. Miller is not proud of having made and disseminated the flyer but believes it was important to do in order for the Republican Party to win the Senate District 28 seat in November.²⁹

37. Respondent Nelson did not know that Miller had made the flyer, and Nelson did not participate in creating or disseminating the flyer.³⁰ He first saw the flyer after it was disseminated.³¹

38. Meg Walch was not aware that Respondent Miller had created the flyer. When Ms. Walch saw the flyer, she thought it was horrible.³²

39. Respondents Nelson and Miller attended the Republican endorsing convention on April 29, 2006, along with other Senate Republican Caucus

²⁴ Testimony of Miller.

²⁵ Testimony of Miller.

²⁶ Testimony of Miller.

²⁷ Testimony of Walch; Ex. 7.

²⁸ Testimony of Miller. The Respondents did not dispute that this mailing was “campaign material” within the meaning of Minn. Stat. § 211B.01.

²⁹ Testimony of Miller.

³⁰ Testimony of Miller and Nelson.

³¹ Testimony of Nelson.

³² Testimony of Walch.

employees. Respondent Miller discussed his concerns about the Complainant with about 10 people, including delegates.³³

40. Neither the Complainant nor Ms. Walch received the Republican endorsement for the Senate District 28 seat at the endorsing convention. Instead, Steve Wilson won the endorsement. Ms. Walch signed a pledge that she would support the endorsed candidate and she is no longer running for the seat. The Complainant is still a candidate for the seat and is running in the upcoming primary.

41. Respondent Miller testified at the hearing that, when asked by Minnesota Representative and Speaker of the House Steve Sviggum in June of 2006, whether he had anything to do with the flyer, Miller denied that he had anything to do with it. Respondent Miller testified that he lied to Sviggum about his involvement because he did not want to bring Sviggum into the controversy.³⁴

42. The Complainant filed this complaint against Respondent Daniel Nelson with the Office of Administrative Hearings on July 3, 2006.

43. At the start of the hearing in this matter, counsel for Respondent Nelson moved to substitute Dan Miller for Dan Nelson. The panel allowed Mr. Miller to be added as an additional Respondent.

44. When the legislature adjourned this past session, Respondent Dan Miller took a leave of absence from his job with the Senate Republican Caucus and began working as the political director for the Senate Republican Campaign Committee.³⁵

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.06, subd. 1, provides, in part: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”

³³ Testimony of Nelson.

³⁴ Testimony of Miller.

³⁵ Testimony of Miller.

3. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.³⁶

4. The Complainant has failed to demonstrate by clear and convincing evidence that Respondent Nelson violated Minn. Stat. § 211B.06 because Nelson was not involved in the preparation or dissemination of the campaign flyer.

5. The Complainant has failed to demonstrate that Respondent Miller violated Minn. Stat. § 211B.06 because the evidence is insufficient to prove by clear and convincing evidence that Miller knew the attribution of the headline to the *Winona Daily News* was false or that he likely knew it was probably false.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS ORDERED:

That the Complaint in this matter is DISMISSED.

Dated: September 11, 2006

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Presiding Administrative Law Judge

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

³⁶ Minn. Stat. § 211B.32, subd. 4.

MEMORANDUM

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.³⁷ Based on this standard, the Complainant must show by clear and convincing evidence that the Respondent either published the challenged statement knowing the statement was false or published with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to provide that the Respondent “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.³⁸

As the U.S. Supreme Court has noted, there is not one infallible definition of “reckless disregard.” Inevitably, its outer limits must be marked through case-by-case adjudication. A respondent cannot automatically ensure a favorable decision by testifying that he published with a belief that the statements were true.³⁹

Here, the record reflects that Respondent Nelson merely retrieved factually true information from court records and provided it to Miller. He did not otherwise participate in the preparation of the flyer at issue.

Respondent Miller prepared and distributed the flyer, but the evidence is insufficient to prove by clear and convincing evidence that he knew the attribution of the headline to the *Winona Daily News* was false or that he likely knew it was probably false.

K.D.S., R.C.L., S.M.M.

Administrative Law Judge Steve M. Mihalchick, Concurring

I concur in the result, but believe there is another, more basic, reason the Complaint should be dismissed. Nothing in the language of Minn. Stat. § 211B.06, subd. 1, makes it a crime to prepare or disseminate false material in connection with a political party’s endorsing convention.

³⁷ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

³⁸ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, No. A051125 (Minn. App. Apr. 26, 2006).

³⁹ *St. Amant*, 390 U.S. at 732; *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1253 (9th Cir. 1997) (“As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence.”).

Minn. Stat. § 211B.06, subd. 1, makes it a crime to participate knowingly in the preparation or dissemination of false campaign material that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office. Consistent with the foregoing statute, Minn. Stat. § 211B.01, subd. 2, defines “Campaign material” as any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.

The term “election” is not defined in Minn. Stat. § 211B. It is defined in Minn. Stat. § 10A.01, subd. 15, as “a primary, special primary, general, or special election.” Similar definitions appear throughout Minnesota Statutes. See, e.g., Minn. Stat. §§ 200.02, 204C.04, 204D.28, and 205.01. None extend the term to include political party endorsements.

Candidates are nominated at primary elections and elected at general elections. They are neither nominated nor elected at party endorsing conventions; rather, they are endorsed by their parties for nomination and election.

It is true that influencing a political party’s endorsement will likely ultimately influence a primary or general election. But that is subsequent consequence and not a sufficient reason to interpret Minn. Stat. § 211B.06 broadly to extend its coverage beyond its clear language. The statute is a criminal statute that must be narrowly construed and must clearly and expressly define the conduct it prohibits.

Moreover, there is nothing in Minn. Stat. ch. 211B to indicate that the Legislature intended to become involved in the internal workings of political parties. Using this case as an example, Miller prepared the flyer and disseminated it for the purpose of influencing the delegates at the Senate District 28 endorsing convention. Those delegates no doubt had the opportunity at the convention to inform themselves about the contents of the flyer and Complainant had the opportunity to respond to the flyer at the convention. There may be some need to shield the mass of voters at large from the unfair advantage of knowingly false campaign material, but there is no such need where the recipients of the possibly false material are knowledgeable, active political party members who are meeting specifically to consider the qualifications, presentations, and responses of individuals seeking the endorsements of that party. That process provides for a full exposition of ideas, information, and opinions. Regulation of the content of that process is not needed and was not intended.

There is no evidence the flyer was distributed by Miller after the endorsing convention. As Miller testified, the flyer was prepared and distributed by him to influence the party endorsing convention. Thus, there is no violation of Minn. Stat. § 211B.06.

S. M. M.